IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A289/2012

DATE: 17 AUGUST 2012

In the matter between:

EPHRAIM ESAU Appellant

and

THE STATE Respondent

J U D G M E N T

YEKISO, J

The appellant, together with his co-accused, were charged in the Regional Court, in the Regional Division of the Western Cape, held at Oudtshoorn, with housebreaking with intent to commit an offence unknown to the state.

The allegation against the appellant, as well as his co-accused, was that on 15 November 2010 and at or near Langenhoven Road, Oudtshoorn, within the Regional Division of the Western Cape, they wrongfully and intentionally broke into the residence of Lowens Johannes Christoffel Erasmus ("the complainant") and there and then entered the complainant's premises with an intention to commit an offence

unknown to the state.

In an ensuing trial the appellant, as well as his co-accused, pleaded not guilty to the charge against them. After hearing evidence the magistrate concluded that the state had succeeded to prove that the break-in into the premises of the complainant was with the intention to steal and, accordingly, convicted the appellant, as well as his co-accused, of housebreaking with intent to steal.

Whilst his co-accused was sentenced to five years direct imprisonment, the appellant was sentenced to five years imprisonment in terms of the provisions of Section 276(1)(i) of the Criminal Procedure Act, 51/1977.

A subsequent application for leave to appeal against sentenced imposed was refused. This appeal against the sentence only, is by leave of this court. I may also mention that for the duration of their trial in the court *a quo* both the appellant as well as his co-accused were legally represented.

It is trite that a matter of a sentence is a matter which is inherently within the discretion of the presiding judicial officer. A court of appeal will rarely, if ever, interfere with the exercise of such a discretion. It is only in those rare instances where

the trial court has exercised such a discretion injudiciously, that an appeal court would interfere with the exercise of such a discretion. In the instance of this matter the evidence tendered at trial showed that the appellant, as well as his co-accused, entered the complainant's premises by opening a side door leading to the *stoep* whilst the complainant as well as his live-in partner and the latter's son were seated in the kitchen. At some point the complainant's live-in partner had left the kitchen to go into the bedroom whereupon she discovered that two persons were inside the bedroom. She thereafter alerted the complainant who came to the scene and, in the process, the appellant, as well as his co-accused, managed to flee from the premises. They were thereafter pursued by the complainant as well as his live-in partner's son and were ultimately waylaid by police officers who happened to have been in the vicinity where the appellant, as well as his co-accused, were being pursued.

The record shows that the magistrate, in the determination of what he considered an appropriate sentence ought to be in the instance of this matter, took into account all those traditional factors that courts normally take into account in the determination of what ought to be an appropriate sentence.

The appellants personal circumstances are on record. The

record shows that the presiding judicial officer, in the determination of what he considered to be an appropriate sentence, took into account the appellant's personal circumstances, the gravity of the offence as well as the interest of the community. There is absolutely no indication on record, in my view, that the magistrate over-emphasised any one of the relevant factors over and above the other. Because of the gravity of the offence, the prevalence thereof in the region of his jurisdiction, the magistrate determined that five years imprisonment in terms of the provisions of Section 276(1)(i) of the Criminal Procedure Act was an appropriate punishment in the instance of the appellant. I cannot find fault in the approach adopted by the magistrate in the determination of this punishment. On the face of it, it might well appear that a sentence of five years imprisonment in terms of Section 276(1)(i) of the Criminal Procedure Act is a bit severe, but the fact that an appeal court might be of the view that it may have imposed a sentence different to that imposed by the trial court is no justification to interfere with the exercise of the magistrate's discretion on the sentence imposed. It has nonetheless been brought to our attention, by way of submissions by appellant's counsel, that the appellant has since been released from custody and is currently under correctional supervision. We have carefully considered the appellant's counsel's submissions, but we are of the view that

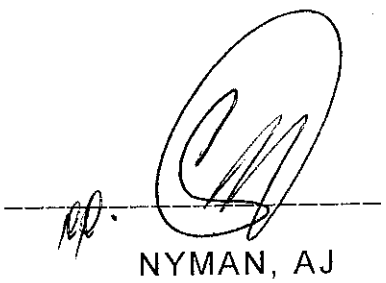
the sentence, as imposed by the magistrate, is the appropriate sentence in the circumstances of this matter.

Consequently, in my view, the determination of the sentence imposed by the magistrate cannot be faulted and for that reason the appellant's appeal ought to fail.

In the result I would proposed the following order:

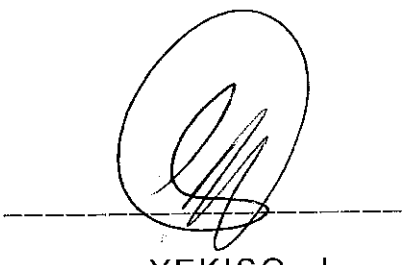
That the appeal be **DISMISSED** and the sentence imposed be confirmed.

I agree.



NYMAN, AJ

It is so ordered.



YEKISO, J